

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1786

Cir. Ct. No. 2007CV1869

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE AWARD OF ATTORNEY FEES:

STEVEN T. KILIAN,

PLAINTIFF-APPELLANT,

V.

**DAIMLERCHRYSLER FINANCIAL SERVICES AMERICAS, LLC , d/B/A/
MERCEDES-BENZ FINANCIAL, A FOREIGN CORPORATION,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
DONALD J. HASSIN, JR., Judge. *Affirmed and cause remanded with directions.*

Before Brown, C.J, Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Steven T. Kilian appeals from an order awarding him attorney fees and costs in this hard-fought Lemon Law litigation. The circuit court reduced the amount he requested in an across-the-board fashion because he did not properly document his fees relative to claims on which he prevailed. We affirm the order. We also remand, however, for the court to clarify its disposition of the supplemental fee request.

¶2 The supreme court determined that Kilian could maintain an action for equitable relief under WIS. STAT. § 218.0171(7) (2011-12)¹ of Wisconsin's Lemon Law. *Kilian v. Mercedes-Benz USA, LLC*, 2011 WI 65, ¶60, 335 Wis. 2d 566, 799 N.W.2d 815. It also determined that Mercedes-Benz Financial (Financial) violated the Lemon Law by enforcing the lease Kilian had with Mercedes-Benz (Mercedes) after his attorney informed Financial that he had received a refund and after assuring him it would cease collection efforts; that Kilian prevailed when Financial ceased enforcement efforts after he filed suit; and that Kilian was entitled to his costs, disbursements and reasonable attorney fees, but not an award for pecuniary loss. *Id.* The court thus remanded for a determination of costs and reasonable attorney fees. *Id.*

¶3 On remand, a new judge presided over the circuit court due to Kilian's substitution request. Kilian sought \$5278.69 in costs and \$300,420.75 in attorney fees. In a supplemental affidavit, Kilian requested an additional \$29,096.75 in fees. Mercedes and Financial argued that he was not entitled to fees related to claims on which he did not prevail. As Kilian did not segregate the fees in that manner, Mercedes and Financial proposed two alternative methodologies,

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

one limiting Kilian's fee recovery to \$4000, the other to \$9200. The circuit court awarded Kilian his costs and \$75,000 in fees, approximately twenty-five percent of \$300,420.75.

¶4 We review the circuit court's award of attorney fees under the erroneous exercise of discretion standard. *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 987, 542 N.W.2d 148 (1996). "A circuit court properly exercises its discretion if it 'employs a logical rationale based on the appropriate legal principles and facts of record.'" *Id.* (citation omitted).

¶5 The Lemon Law is a fee-shifting statute. See WIS. STAT. § 218.0171(7). Wisconsin has adopted the lodestar methodology for determining reasonable attorney fees under such statutes. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶30, 275 Wis. 2d 1, 683 N.W.2d 58. Under this analysis, the reasonable hours expended are multiplied by a reasonable rate, with upward or downward adjustments based on factors enumerated in SCR 20:1.5(a). See *Kolupar*, 275 Wis. 2d 1, ¶¶25, 29. Further, a plaintiff must be a "prevailing party" to recover attorney fees. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Where the plaintiff fails to prevail on a claim that is distinct from the successful claims, the hours spent on the unsuccessful claim should be excluded. *Id.* at 440; see also *Cook v. Public Storage, Inc.*, 2008 WI App 155, ¶¶97-98, 314 Wis. 2d 426, 761 N.W.2d 645. An award may be reduced by excessive, redundant, unnecessary or inadequately documented hours and hours that were not "reasonably expended." See *Hensley*, 461 U.S. at 433-34. An important consideration is "results obtained." *Id.* at 434; see *Kolupar*, 275 Wis. 2d 1, ¶25.

¶6 This is precisely how the circuit court proceeded. Kilian's request put forth hours expended multiplied by his attorneys' rates. The court then took

note of the supreme court’s directive that Kilian be awarded reasonable attorney fees “caused by” Financial’s violation of WIS. STAT. § 218.0171(2)(cm)3., meaning fees “essential” to his success. *See Kilian*, 335 Wis. 2d 566, ¶58 & n.22. The circuit court observed that Kilian prevailed on his claim that Financial continued to enforce the lease but not on his defamation and inconvenience claims, his claim that Financial was responsible for his prelitigation fees, or any of his claims against Mercedes. It concluded that the successful and unsuccessful issues were factually and legally distinct, such that the lodestar amount should be reduced by the fees attributable to the issues on which he did not prevail. Kilian did not separate what fees went to which claim, however, but instead adopted an “all or nothing” approach. It thus was left to the court to fairly approximate the fees for the successful claims.

¶7 The circuit court observed that Kilian might have stopped six weeks into the litigation when he gained equitable relief but that he, as well as the opposing parties, pushed on for five years, racking up hundreds of thousands of dollars in attorney fees. It found untenable, however, the “nearly nothing” fee proposals Mercedes and Financial put forth. Ultimately, the court found Kilian’s documentation so inadequate as to warrant a seventy-five percent across-the-board reduction. The party seeking attorney fees must support the request with documentation of the hours worked and rates claimed. *Kolupar*, 275 Wis. 2d 1, ¶31. Kilian did not bear his burden.

¶8 We commend Judge Hassin for his excellent decision, despite the challenge of coming late to this case. He meticulously examined the relevant law and facts, weighed both sides’ arguments and shortcomings, considered the equities, and backed up his conclusions. We reject the spin Kilian’s attorneys put on the decision. They assert that the fee reduction resulted from the court’s

“negative opinion of Kilian and/or his lawyers” and its “disdain” for Kilian not dropping his claim once the lease was paid off. The expert’s affidavit they submitted opining how he would apply the SCR 20:1.5(a) factors is informative but does not undermine the reasoned approach taken by the judge who actually presided over this matter.

¶9 Lastly, the court mentioned the \$29,096.75 presented in the supplemental fee request. It is not clear, however, whether that additional amount is accounted for in the \$75,000 or whether the court intended to add some or all of it to the fee award. We remand for the circuit court to clarify its determination.

By the Court.—Order affirmed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

